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No. 92-389

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

RICHARD CHENEY, Secretary of Defense, et al.,
Petitioners,

vs.

DUSTY PRUITT,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals erred in concluding that Respondent's equal protection claim should be remanded to the district court for further appropriate proceedings under the rational basis test and not dismissed for failure to state a claim.

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No. 92-389

In the Supreme Court of the United States

October Term, 1992

Richard Cheney, Secretary of Defense, et al., Petitioners,

v.

Dusty Pruitt, Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Dusty Pruitt submits this brief in opposition to the petition for a writ of certiorari in this case.

STATEMENT OF THE CASE

Respondent Dusty Pruitt served on active duty in the United States Army from January 6, 1971, until February 1976, ultimately rising to the rank of Captain. Excerpts of Record ("ER") 276. She spent most of her active duty career as a military recruiter, where she was commended for "her extraordinary leadership ability," ER 244, "her cooperative and positive attitude," ER 280, and her "initiative, determination, and tireless efforts." ER 244. She was also described as "an outstanding young officer with unlimited potential for advancement," ER 278, and she received perfect scores on several evaluations by her superiors. *E.g.*, ER 278, 280.

Respondent left active duty in 1976 to seek ordination as a minister and entered the Army Reserve. ER 274, 276. In 1979, she began service as an instructor at the Nuclear, Biological, and Chemical School. During her tenure in this position, she was described as "an officer who sets and maintains the highest standards of moral conduct both on and off duty." ER 269. After her final assignment at this school, her superiors stated that "she displayed the highest degree of self-discipline and is completely reliable. Her can-do attitude, professionalism, dedication, selflessness, and enthusiasm show that she has unlimited potential." ER 267. As the court of appeals commented, "Pruitt's outstanding record in both active and reserve service is undisputed." Petition, App. 4a.

On May 25, 1982, Respondent was notified of her selection for promotion to Major, effective February 6, 1983. ER 10. The promotion never took place; it was rescinded following the publication in the Los Angeles Times on January 27, 1983 of an interview with Respondent in her civilian capacity as pastor of the Metropolitan Community Church. ER 12-13. Entitled "Pastor Resolves Gay, God Conflict: Church Works to Heal Homosexual's Religious Scars," the article focused on Respondent's personal struggle with her sexuality and her Baptist

upbringing, her ministry, and her Army career. In the article, she identified herself as a lesbian.

In a letter dated February 7, 1983, Respondent was informed that her pending promotion to Major had been suspended, and that an investigation alleging "Moral/Professional Dereliction" under Army Regulation 135-175 had been commenced. ER 15. On April 4, 1983, Respondent filed a verified complaint in federal district court challenging the withdrawal of her promotion and her threatened discharge. ER 1. In June 1983, Petitioners filed a motion to dismiss Respondent's complaint. The district court denied this motion without prejudice to renewing it once the Army had decided whether or not to discharge Respondent. ER 129-37.

The Army's investigation took more than two years. During the course of the investigation, in response to a letter advising Respondent that her security clearance would be revoked, Respondent protested the withdrawal of her security clearance, stating:

> "I am a homosexual. I do not believe that as a homosexual woman, I am a security risk; therefore, I cannot see what the matter of my being a homosexual has to do with my security clearance. . . ."

ER 178. The investigation found no evidence that Respondent had committed a homosexual act. Petition, App. 6a ("there is no evidence in this case that [Respondent] engaged in homosexual acts, or made any advance toward any active or reserve soldier that might be construed as homosexual conduct").

Finally, on September 7, 1985, an Army Reserve Elimination Board convened a hearing to determine Respondent's suitability for retention. The Army introduced only two exhibits: 1) the verified complaint, including the Los Angeles Times article; and 2) Respondent's May 16, 1984 letter protesting the withdrawal of her security clearance. ER 223-25. Respondent introduced her military record described above. After deliberation, the Board issued the following findings:

1. That Captain Pruitt stated she was a homosexual as evidenced by [the May 16th letter].
2. That the criteria of Paragraph 2-39 of AR 135-175 have been met and discharge is warranted.
3. That there is no evidence to indicate [Captain] Pruitt's service should be characterized as other than Honorable.
4. That [Captain] Pruitt's argument as to the constitutionality of the regulation are outside the scope of this Board's authority.

ER 225.[1]

Consequently, the Board recommended that Respondent be eliminated from the Army Reserve with an honorable discharge. This recommendation was forwarded to the Secretary of the Army for review. On February 12, 1986, still awaiting the decision of the Secretary, Respondent filed a motion for summary judgment seeking a declaration that the Army's regulation was unconstitutional because it required her discharge solely on the basis of her assertion of her status as a lesbian rather than because of any conduct in which she engaged. At oral argument of the motion, the district court stated its intent to await a final decision by the Secretary before ruling on the motion. ER 305-23.

On July 9, 1986, the Secretary issued an order discharging Respondent. ER 333. Petitioners thereafter renewed their motion to dismiss, which the district court granted on April 7, 1987. Petition, App. 21a. The court also denied Respondent's pending motion for summary judgment. Petition, App. 22a. In dismissing Respondent's complaint without leave to amend, the

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[1]Petitioners misrepresent these findings and claim that the Board recommended discharge based on Respondent's statement in the Los Angeles Times article about her participation in two church commitment ceremonies. Petition at 3. The findings of the Board show that the ceremonies were *not* the basis for her discharge. ER 224-25. *See also* Petition, App. 22a-23a.

court ruled that her statement that she is a lesbian was "simply an admission that she comes within a classification of people whose presence in the Army is deemed by the Army to be incompatible with its . . . expressed goals." Petition, App. 24a.

On appeal, Respondent argued that the regulation, both on its face and as applied, violated her First Amendment right to identify herself as a lesbian and her Fifth Amendment right to equal protection of the law. The court of appeals issued its unanimous decision on August 19, 1991. The court rejected Respondent's claim that the regulation violated her First Amendment right to identify herself, holding that the Army discharged Respondent not for the content of her speech, but for being a homosexual. Petition, App. 10a.

The court of appeals also ruled, pursuant to existing Ninth Circuit precedent, that classifications based on sexual orientation are subject only to rationality review under the Fifth Amendment. The court did not rule, however, on the merits of Respondent's claim that the regulation violated her right to equal protection of the law. Instead, the court of appeals remanded the case to the district court for "appropriate proceedings, including those directed toward determining whether the Army's discrimination is rationally related to a permissible governmental purpose." Petition, App. 20a.

In reaching its decision to remand the case, the court rejected Petitioners' reliance on *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981), for the proposition that social disapproval of homosexuality justifies the Army's regulation. The court of appeals instead held that such justifications "should not be given unexamined effect today as a matter of law." Petition, App. 15a. Having been offered no specific justification in the present case for either the Army regulation or Respondent's discharge, the court declined to accept Petitioners' unsupported assertion that the regulation is rational as a matter of law, "without any justification in the record at all." Petition, App. 18a. The court therefore remanded the case to provide the Army an opportunity to proffer

a basis for its exclusionary regulation that is rationally related to a permissible governmental purpose. Petition, App. 20a.

The court of appeals circumscribed its ruling by directing the lower court to "remain aware of the proper respective roles of the military and the judiciary in entertaining further proceedings in this case." Petition, App. 18a. Although the court acknowledged that military decisions "are not lightly to be overruled by the judiciary," *id.*, the court pointed out that deference to military judgment in the absence of any supporting factual record "would come close to denying reviewability at all," *id.* at 19a, a position not asserted by Petitioners. As the court concluded, "[t]he Army does not ask us to deny review; it asks us to uphold its regulation without a record to support its rational basis. This we decline to do." *Id.*

Following the decision of the court of appeals, Petitioners filed a petition for rehearing with suggestion for rehearing *en banc*. On May 8, 1992, the court of appeals issued a modestly amended opinion, with an order denying the petition for rehearing, again pursuant to a unanimous vote of the panel. The order stated that the full court had been advised of the suggestion for rehearing *en banc* and that not a single judge of the court of appeals had requested a vote to rehear the matter *en banc*. Petition, App. 2a.

REASONS FOR DENYING THE PETITION

I. CHANGING CIRCUMSTANCES MILITATE AGAINST REVIEW BY THIS COURT AT THIS TIME

Petitioners ask this Court to review Respondent's facial and as-applied challenge to a regulation that is in flux, with justifications that are fluctuating as well. Such review is untimely, posing great risks of mootness or the necessity of a later remand should the Court take up this matter now, before district court proceedings develop a proper record.

A. First and foremost, Respondent's challenge to the regulation is likely to have a political resolution, due to the

recent presidential election, that will obviate the need for judicial consideration of this case. President-elect Bill Clinton has stated that, upon taking office, he will immediately rescind the military's ban on service by lesbians and gay men.[2] Thus, the election of President Clinton will result in the significant revision, if not the rescission, of the regulation challenged by Respondent.[3] This Court should not expend its resources accepting review of a case in which the basic elements being challenged are likely to change significantly in the coming months. Indeed, Respondent expects that this case may well be settled once the new Administration is in place.

B. In addition, the Department of Defense itself appears to be in the process of changing its rationale for the regulation. For instance, Secretary of Defense Richard Cheney, one of the Petitioners here, acknowledged last year in testimony before Congress that the notion that gay men and lesbians are a security risk, as postulated in the military's stated rationale for the policy, is "a bit of an old chestnut." Wash. Post, Aug. 1, 1991, § 1, at A33. Shortly after that statement, the Department of Defense released a study finding that sexual orientation is not a factor in predicting security risk. *See* Wash. Post, Oct. 10,

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[2]Wash. Post, Sept. 28, 1992, § 1, at A1 ("Clinton has pledged to sign an executive order ending the U.S. military policy discriminating against homosexuals"); Los Angeles Times, Aug. 30, 1992, part A, at 15, col. 1.

[3]The effect of such a change on this case, as well as other pending challenges to the military's policy, has been expected by many to be significant. Indeed, prior to the election, Petitioners themselves sought and obtained stays of some of the pending challenges based on the speculative status of the regulation in light of the election. *See, e.g., Cammermeyer v. Cheney*, No. C-92-942Z (W.D. Wash.) (discharge of lesbian Colonel and Chief Nurse of Washington National Guard; stipulated stay of proceedings until November 30, 1992).

1992, at A20.[4] These developments signal ongoing changes in the official rationale for the policy.

Further, Petitioners' presumption that the presence of lesbians and gay men in the military will harm morale, recruitment, and the public acceptability of military service is undermined by recent information. Two independent polls have found that a substantial majority of Americans believe that gays and lesbians should be allowed to serve. *See* USA Today, June 26, 1991 at 3A; Time, Aug. 12, 1991, at 11. In fact, the poll reported in USA Today found that, when asked "If a homosexual in the armed forces is doing a good job, should that person be discharged?" 81 percent of respondents answered "no."

These and other findings are not contained in the record of this case. Absent remand, there is an inadequate record with which to evaluate the previously unexamined and currently evolving rationale asserted by Petitioners. In light of the recent presidential election, the changing rationale for the policy, and new information casting doubt on the policy's stated rationale, this Court should decline to review this case on the current record at the current time.

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[4]An earlier draft of the report described above, which was rejected by the Department for exceeding the scope of the assigned research, called for an end to the policy barring gays and lesbians from military service. N.Y. Times, Oct. 22, 1989, § 1, Part 1, at 1, col. 6. This conclusion was echoed in a report issued by the Government Accounting Office, which reviewed the military's policy and found substantial evidence undermining its stated rationale. U.S. Gen. Accounting Office, Report to Congressional Requesters, Defense Force Management: DOD's Policy on Homosexuality (June 12, 1992). At least one military commentator has publicly called for revision of the policy to exclude only those who commit acts that are shown to be prejudicial to good order and discipline. *See* Davis, Maj. Jeffrey, *Military Policy Toward Homosexuals: Scientific, Historical, and Legal Perspectives*, 131 Mil. L. Rev. 55, 105 (1991). The weekly newspapers of the Army and Air Force likewise have called on the Pentagon to end its ban on lesbians and gay men in the armed services. N.Y. Times, Aug. 30, 1992, § B, at 10, col. 6.

II. REVIEW AT THIS TIME ALSO IS PREMATURE BECAUSE NATIONAL POLICY REMAINS INTACT AND FUTURE PROCEEDINGS WILL NOT UNDULY INTERFERE WITH THE MILITARY

A. Petitioners have misstated the issue before this Court. Contrary to Petitioners' framing of the issues, the court of appeals did *not* decide that the Army's regulation violated the equal protection component of the Fifth Amendment, nor did the court of appeals "refus[e] to sustain the Regulation" or "requir[e] the Army to proceed to trial." Petition (I). All that is before this Court currently is the court of appeals' ruling on the propriety of a motion to dismiss, in which the court concluded: "We reverse the judgment of dismissal, and remand for further appropriate proceedings, including those directed toward determining whether the Army's discrimination is rationally related to a permissible governmental purpose."[5] Petition, App. 20a.

Accordingly, Petitioners' request for review of this case in its present posture is, at best, premature. While the issue raised on the merits in this case is one of national significance, the unanimous decision of the court of appeals effects no change on national policy. The court of appeals neither invalidated the policy nor expressed an opinion as to the merits of the asserted rationale for the policy. Rather, the court simply stated that Respondent's complaint may not now be dismissed based solely on Petitioners' unsupported assertion that the policy is rationally related to a permissible governmental purpose.

This decision adopts an appropriately cautious approach to a difficult issue. The court of appeals' decision does nothing more than defer final decision of a constitutional claim "in the absence of any supporting factual record." Petition, App. 19a.

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[5]There is no mandate for a trial, only a direction that the record must be developed further in order to ascertain the rationality of the Army's regulation.

This ruling so conformed to the decisions of this Court and other precedent that not one judge on the circuit requested a vote in response to Petitioners' suggestion for rehearing *en banc*. The court of appeals clearly has not so "far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Sup. Ct. R. 10(1)(a).

B. Petitioners premise their request for review at this time upon the stated desire "to avoid the unwarranted interference with the military chain of command that would result from proceedings on remand." Petition at 19. This concern is wholly unfounded and should not sustain a grant of certiorari at this stage. This Court has recognized the power of a district court to control discovery proceedings and protect litigants, including the government, from unwarranted interference. In *Webster v. Doe*, a challenge to alleged discrimination against lesbians and gay men by the CIA, the Court declined to forbid an inquiry into the agency's hiring and promotion policies over objections that such judicial review would entail "extensive 'rummaging around' in the Agency's affairs to the detriment of national security." 486 U.S. 592, 604 (1988). The Court observed that a district court has "the latitude to control any discovery process which may be instituted so as to balance respondent's need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission."[6] *Id.* (citations omitted).

Further, the issues raised here do not relate to military tactics or strategy, nor has Respondent challenged the decision-making of any individual officer. Thus, remand will not cause

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[6]Petitioners allege that at least one litigant has sought to depose Secretary Cheney, General Powell, and Assistant Secretary Williams. Petition at 19 n.6. That request was made in a letter by a *pro per* plaintiff to counsel for the government. Petitioners do not assert that any such discovery has been allowed to proceed in any case.

"unwarranted interference with the military chain of command," as asserted by Petitioners, Petition at 19, because no military officer will be required to testify "concerning the details of their military commands . . . ." *United States v. Stanley*, 483 U.S. 669, 682-83 (1987). Instead, the policy embodied in the regulation challenged here resembles hiring policies this Court held reviewable, and subject to a reasonable factual inquiry, in *Webster*.

C. Fairly understood, Petitioners seek a ruling that the Army's regulation is unreviewable under any equal protection claim that Respondent might assert. *See* Petition, App. 13a. Yet, as noted by the court of appeals, Petitioners have not contended that judicial review is precluded under the test for reviewability of military decisions adopted in *Wallace v. Chappell*, 661 F.2d 729, 733 n.4 (9th Cir. 1981), *rev'd on other grounds*, 462 U.S. 296 (1983), one prong of which mandates consideration of "the extent to which military discretion or expertise is involved." Petition, App. 19a. The court of appeals appropriately accommodated deference to military judgment by specifically instructing the lower court to consider the respective roles of the military and judiciary in judging whether the record adequately demonstrates a rational relationship to a permissible governmental purpose. *Id.* at 18a.

This approach is entirely consistent with the directives of this Court. In *Rostker v. Goldberg*, this Court stated that "a different equal protection test" does *not* apply simply because a case arises in "the military context." *Rostker v. Goldberg*, 453 U.S. 57, 71 (1981) (citing *Schlesinger v. Ballard*, 419 U.S. 498 (1975)); *see also Frontiero v. Richardson*, 411 U.S. 677 (1973) (applying equal protection without any special deference); *Brown v. Glines*, 444 U.S. 348, 354 (1980) (servicemembers do not abandon their constitutional rights when they enter military service).

Moreover, contrary to Petitioners' assertion, Petition at 18, the decision in *Goldman v. Weinberger*, 475 U.S. 503 (1986), does not command a different result. *Goldman* raised

only a First Amendment challenge, not an equal protection claim. *See id.* at 512-13 (Stevens, J., concurring) (noting that Army rule treated all religions alike and rule might be questionable if it distinguished between religions). There, the Army presented a facially neutral and legitimate explanation for having uniform dress regulations, not an explanation, as here, concededly based on social disapproval of a particular group of people. *See* Petition at 14. Nothing in *Goldman* suggests that this Court would have upheld the Army's rejection of Goldman's request to wear a yarmulke on duty had the sole justification for the refusal been premised on the discomfort of other soldiers around Orthodox Jews. Inquiry here into whether Petitioners have a legitimate justification for the Army's regulation and whether that policy is rationally related to that justification is in no way inconsistent with the analysis set forth in *Goldman*.

In sum, the court of appeals adopted the cautious approach of remanding the case for further inquiry, rather than prematurely, and perhaps unnecessarily, reaching complex issues of constitutional dimension. This Court should exercise its power of review sparingly and avoid those instances where there is an inadequate record and no threat exists to the status quo.[7] The opportunity to address the merits of this case, in the event no political resolution is achieved first, will undoubtedly arise at a later stage of these or other proceedings.

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[7]*See, e.g., Brotherhood of L.F.&E. v. Bangor & A.R.C.*, 389 U.S. 327, 328 (1967) (denying certiorari "because the Court of Appeals remanded the case, [making] it not yet ripe for review"); *Hamilton-Brown Shoe Co. v. Wolfe Bros. & Co.*, 240 U.S. 251, 258 (1916) (lack of finality below may "of itself alone" furnish "sufficient ground for the denial of the application" for certiorari).

III. THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND CREATES NO CONFLICT BETWEEN THE CIRCUITS

A. Despite Petitioners' assertion of a significant conflict between the circuits arising from the decision of the court of appeals, no such conflict exists. No other court of appeals previously has addressed the limited issue of whether a servicemember discharged solely for homosexual orientation may state a claim under the Fifth Amendment's guarantee of equal protection.

In the first place, each of the other courts that has considered the constitutionality of the military's exclusionary policy has done so in the context of a motion for summary judgment or following trial, and not pursuant to a motion to dismiss under Fed. R. Civ. P. 12(b)(6). *See Ben-Shalom v. Marsh*, 703 F. Supp. 1372, 1373 (E.D. Wisc.) (cross-motions for summary judgment), *rev'd*, 881 F.2d 454, (7th Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990); *Woodward v. United States*, 871 F.2d 1068, 1069 (Fed. Cir. 1989) (summary judgment), *cert. denied*, 494 U.S. 1003 (1990); *Dronenburg v. Zech*, 741 F.2d 1388, 1389 (D.C. Cir. 1984) (summary judgment); *Rich v. Secretary of the Army*, 735 F.2d 1220, 1224 (10th Cir. 1984) (three-day trial). Accordingly, none of those courts addressed the question of whether a lesbian or gay servicemember discharged solely because of her or his sexual orientation is precluded as a matter of law from ever raising an equal protection claim.

Moreover, the decisions cited by Petitioners are distinguishable on other grounds as well. Petitioners themselves readily concede that *Dronenburg* and *Rich* are "distinguishable because proof of particular homosexual acts was presented in those cases." Petition at 8. Similarly, despite Petitioners' claim that *Woodward v. United States* was decided solely on the basis of the plaintiff's status, the Federal Circuit expressly rejected that interpretation by acknowledging that it "need not address the

factual situation where there is action based *solely* on 'status as a person with a homosexual orientation.'" 871 F.2d at 1074 n.6. Further, Petitioners acknowledge that *Dronenburg*, *Rich*, and *Woodward* were based in part on social disapproval of homosexuality, Petition at 9, a basis that at a minimum requires further inquiry to ascertain the continuing legitimacy of the Army's motivation. *See* section III.B.2. hereof, *infra*. Finally, and perhaps most significantly, none of the courts cited by Petitioners had the benefit of recent information referred to above casting doubt on the rationality of the justifications asserted for the policy.

B. Petitioners assert that the court of appeals made three subsidiary errors of law in remanding the case to the district court: 1) "the erroneous premise that the regulation classifies servicemembers on the basis of their 'status' alone"; 2) the rejection of "social disapproval of homosexuality" as a justification for the regulation; and 3) application of "an inappropriate heightened standard of review." Petition at 9. As explained below, however, the court of appeals' ruling on each of these issues is consistent with the holdings of this Court.

1. Petitioners contend that there is no legally relevant distinction between status and conduct, since status is indicative of a "propensity" to engage in proscribed conduct. Consequently, they argue, the criminalization of sodomy in the military, *see* 10 U.S.C. § 925, justifies a regulation that excludes those the military presumes will violate the law. Petitioners are wrong for several reasons.

Fundamentally, Petitioners confuse sodomy with homosexuality. Their argument fails to recognize that the Uniform Code of Military Justice ("UCMJ") criminalizes certain sexual acts and applies with absolute equality on its face to the same acts regardless of whether they are committed by heterosexuals or homosexuals. 10 U.S.C. § 925. Because of the broad reach of this statute, it is not reasonable to presume that only homo-

sexual individuals will violate it.[8] Nevertheless, as the court of appeals correctly recognized, Army Regulation 135-175 classifies on the basis of status and not conduct because it is directed only at homosexuals.[9] *See* Petition, App. 27a (providing for retention of servicemembers who have engaged in homosexual acts but who claim a heterosexual orientation). Thus, all that is at issue on the merits in this case is whether it is constitutionally permissible to require automatic exclusion of all lesbians and gay men from service while at the same time not requiring the exclusion of any heterosexuals, not even those who have admitted engaging in criminal acts of sodomy with individuals of the same or a different sex.

Because the regulation at issue in this case uses homosexuality, not sodomy, as its basis for classification, the decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), which held that a state may criminalize acts of sodomy without violating substan-

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[8]The UCMJ criminalizes heterosexual and homosexual oral and anal intercourse. Thus, heterosexuals, including married couples, have been prosecuted under 10 U.S.C. § 925 for engaging in oral or anal sex with one another. *See, e.g., United States v. Jones*, 14 M.J. 1008 (A.C.M.R. 1982); *United States v. Harris*, 8 M.J. 52 (C.M.A. 1979). Adultery is also a crime under the UCMJ. *See United States v. Hickson*, 22 M.J. 146 (C.M.A. 1986). *See also* P. Blumstein & P. Schwartz, *American Couples* 236, 242 (1983) (from 90 to 93% of heterosexual persons have engaged in oral intercourse; a smaller percentage in anal intercourse).

[9]This Court has long recognized the constitutional distinction between status and conduct. *See Robinson v. California*, 370 U.S. 660 (1962); *Powell v. Texas*, 392 U.S. 514 (1968). Writing for the Ninth Circuit in *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981), a substantive due process challenge to a prior version of the Navy's comparable regulation, Justice Kennedy recognized the distinction between homosexual status and conduct when he suggested in dictum that individualized determinations regarding eligibility for service might be appropriate for cases involving the exercise of protected activities, including "sexual personality and preference." *Id.* at 808 n.20. *See* Petition, App. 14-15a (distinguishing holding in *Beller*).

tive due process guarantees, does not control this case. The doctrinal analysis here is completely different, because Respondent asserts an equal protection claim, a question not before the Court or ruled on in *Bowers*. *See* 478 U.S. at 196 n.8.[10] Unlike the due process clause, the equal protection clause does not safeguard social convention or tradition, however longstanding or deeply ingrained.

Moreover, even if *Bowers* were read to preclude suspect or quasi-suspect scrutiny under the equal protection clause, as Petitioners argue it should be, there is no conflict presented by the ruling at bar because the court of appeals required only rational basis review. In sum, *Bowers* does not in any way alter the propriety of this Court declining to review the decision below to remand this case for a determination of whether the regulation at issue is rationally related to a permissible governmental purpose.

2. Petitioners also claim that the court of appeals erred in failing to uphold the right of the Army to justify its regulation on the bare assertion of social disapproval of homosexuality. Petition at 14. Petitioners have misunderstood the directives of this Court and the ruling of the court of appeals. The court of appeals' decision, in accordance with the decisions in *Palmore v. Sidoti*, 466 U.S. 429 (1984), and *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), states only that the military's policy may not be based upon private biases or the prejudice of others. The court carefully distin-

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[10] *See generally*, Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. Chi. L. Rev. 1121 (1988) (discussing *Bowers*). This Court has made clear that one cannot simply import reasoning dealing with one aspect of the Constitution into the analysis of a different portion of the Constitution. *See Nollan v. California Coastal Commission*, 483 U.S. 825, 834 n.3 (1987). Voting rights cases provide one example of this. While a state constitutionally may limit all individuals' vote on a particular matter, the state may not constitutionally make an invidious distinction between groups in access to the vote. *See, e.g., Gordon v. Lance*, 403 U.S. 1 (1971).

guished those instances where action is based upon "disapproval of specific acts of criminal conduct . . . ." Petition, App. 14a. The court of appeals thus merely followed the previous rulings of this Court and multiple lower courts that adverse government action against a particular group of people does not serve a legitimate governmental interest if it is premised on antipathy arising from prevailing fears of, prejudice toward, or stereotypes about the group's members.[11] Indeed, mere social disapproval,

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[11] *See, e.g., Cleburne*, 477 U.S. at 448 ("mere negative attitudes, or fear, . . . are not permissible bases" for differential treatment of the mentally retarded); *Bannum, Inc. v. City of Fort Lauderdale*, 901 F.2d 989, 999 & n.30 (11th Cir. 1990) (vacating summary judgment and remanding for analysis of whether withdrawal of zoning approval for residential program for formerly incarcerated individuals was based on mere negative attitudes or fear); *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1224-25 (2d Cir. 1987) (governmental body may not escape liability for violation of equal protection where discriminatory action was undertaken in response to the racist attitudes of the majority of its constituents) (listing and discussing cases), *cert. denied*, 486 U.S. 1055 (1988); *Sullivan v. City of Pittsburgh*, 811 F.2d 171, 185 (3d Cir.) (upholding injunction against closure of alcoholic treatment center where plaintiffs "demonstrated that the City took its essentially unjustified action in an atmosphere charged with hostility towards a minority group."), *cert. denied*, 484 U.S. 849 (1987); *J. W. v. City of Tacoma*, 720 F.2d 1126, 1129 (9th Cir. 1983) (invalidating application of ordinance where legislative purpose was based on "archaic and stereotypic notions" about the mentally ill); *Burstyn v. City of Miami Beach*, 663 F. Supp. 528, 537 (S.D. Fla. 1987) ("Where fear and prejudice [of elderly] are a motivating factor in passage of an ordinance, a violation of the equal protection clause results."). Similarly, religious beliefs behind such moral judgments or social disapproval cannot provide a legitimate purpose to a discriminatory policy. *See, e.g., Marks v. City of Chesapeake*, 883 F.2d 308, 311 (4th Cir. 1989) (denial of permit to practice palmistry as "rituals" believed to be heretical not a legitimate purpose; officials cannot act solely "in reliance on public distaste for certain activities"); *Islamic Center of Mississippi v. City of Starkville*, 840 F.2d 293, 302 (5th Cir. 1988) (neighbors' negative attitudes and fears not a permissible basis for distinguishing between familiar and unfamiliar religions).

has never been an appropriate justification for a discriminatory policy in light of the fact that the very purpose of the equal protection doctrine is to protect minorities, who frequently are targets of social disapproval, from abuse at the hand of the majority.[12] Remand for examination of whether the Army's goals are indeed legitimate is therefore supported by the caselaw and does not warrant review by this Court.

3. Finally, Petitioners are wrong in asserting that the court of appeals applied "an inappropriate heightened standard of review." Petition at 9. The court explicitly recognized that, under existing precedent, it was foreclosed from applying heightened scrutiny to Respondent's claim. Petition, App. 16a. Accordingly, the court of appeals did not apply heightened scrutiny. Relying on this Court's decision in *Cleburne, supra*, the court of appeals merely remanded the case to give Petitioners an opportunity to demonstrate on the record whether the regulation is rationally related to a permissible governmental purpose.[13] This was entirely in accordance with pre-existing circuit precedent. *See High Tech Gays v. Defense Industrial Security Clearance Office* ("DISCO"), 895 F.2d 563

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[12] *See e.g., Palmore, supra*, 466 U.S. at 433 (racial prejudice of others cannot justify denial of custody to interracial couple); *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534-35 (1973) (food stamp legislation intended to discriminate against hippies based on impermissible purpose); *see generally Developments in the Law – Sexual Orientation and the Law*, 102 Harv. L. Rev. 1508, 1568-70 (1989); Sustein, *supra* n.10, at 167-68.

[13] In *Cleburne*, the Court struck down the application of a zoning regulation to a home for mentally retarded individuals based on the failure of the City to demonstrate on the record a rational basis for its requirement of a special use permit. As the court of appeals pointed out, the Court rejected as illegitimate the City's proffered justification of the negative fears and attitudes of neighbors and found the requirement irrational in light of the failure to impose a similar requirement on other group homes. *See Cleburne*, 473 U.S. at 448-49; Petition, App. 16-17a.

(9th Cir. 1990), (upholding on summary judgment DISCO's policy of conducting expanded security investigations for persons reporting lesbian or gay sexual conduct based on evidence in the record establishing legitimate rational basis for the policy);[14] *Dubbs v. CIA*, 866 F.2d 1114 (9th Cir. 1989) (remanding claim of disparate treatment of lesbians and gay men in security clearance determinations to permit a factual inquiry into the CIA's policy and its justifications).

The appropriateness of a factual backdrop to perform rationality review adequately has been recognized by numerous other circuits. For example, in *Mahone v. Addicks Util. Dist.*, 836 F.2d 921 (5th Cir. 1988), the Fifth Circuit remanded an equal protection claim that had been rejected by the district court on a motion to dismiss for failure to state a claim. Recognizing that a number of factors, including the facts pleaded by a plaintiff, the state of knowledge of the court, and the complexity of the official action being challenged, affect the appropriateness of looking beyond the pleadings to perform a rational relationship analysis, the court declined to "fashion a single rule for all circumstances" and remanded the case for development of "a factual backdrop." *Id.* at 937; *see also Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 471-72 (8th Cir. 1991) (remanding for determination of rational basis where record consisting of conclusory statements by city officials failed

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[14]The decision in *High Tech Gays* demonstrates that changing factual circumstances may erode a presumed or prior factual basis for governmental policy. DISCO based its policy requiring such expanded investigations on evidence suggesting that the KGB had been known to target suspected homosexual individuals. *High Tech Gays*, 895 F.2d at 578. However, with the demise of the Soviet Union and the dismantling of the KGB, and the release of new Department of Defense research concluding that sexual orientation is *not* a factor in predicting security risk, *see* Wash. Post, Oct. 10, 1991, at A20, the basis for the ruling in *High Tech Gays* may not justify continued application of the policy challenged in that case and does not establish a rational basis for the broader exclusionary policy challenged by Respondent.

to justify unequal treatment); *Bannum, Inc. v. City of Fort Lauderdale*, 901 F.2d 989, 999 & n.30 (11th Cir. 1990) (remanding equal protection claim for factual inquiry into justifications unrelated to unsubstantiated fears and negative attitudes); *Phan v. Virginia*, 806 F.2d 516, 522-23 (4th Cir. 1986) (hypothesizing legitimate purpose but remanding for determination of fit between purpose and classification).

The court of appeals did not stray from this well-considered authority. Petitioners' repeated complaint that such review constitutes "heightened scrutiny," Petition at 7, 9, and 17, is unfounded. The decision of the court of appeals does not require Petitioners to establish that its policy is "substantially related to a sufficiently important governmental interest." *Cleburne*, 473 U.S. at 441. Rather, it need only be determined that the Army's policy is rationally related to a legitimate governmental interest. Given the complexity of the issues presented by Respondent's challenge, the court of appeals' ruling that such a showing is required was appropriate in this case and does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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